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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the matter of	)	**Dockets OST-97-2881 – 182**
	)	**OST-97-3014 – 49**
Computer Reservations System (CRS) Regulations	)	**OST-98-4775 – 94**

REPLY COMMENTS OF UNITED AIR LINES, INC.

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DATED: October 26, 2000

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COMMENTS OF UNITED AIR LINES, INC.

United Air Lines, Inc. ("United") files these Reply Comments pursuant to the Department's Supplemental Advanced Notice of Proposed Rulemaking ("Supplemental ANPRM"), 65 Fed. Reg. 45551 (July 24, 2000).

I. Introduction

As anticipated, the Department has again received a multitude of submissions in this proceeding, with parties taking positions throughout the "regulate vs. deregulate" spectrum, often supplemented by proposals for new regulatory requirements. While invariably portrayed as "leveling the playing field" or "protecting competition," the proposals to retain and expand the regulations are, in fact, a classic example of rent-seeking through government

regulation, with parties pleading for government intervention that will enhance their parochial economic interests or hamstring competitors.

In reviewing these comments, United urges the Department to return to first principles: (1) its principal responsibility here is to adopt rules that will most enhance consumer welfare, not to balance the parochial desires of competing special interests, and (2) unless presented with compelling evidence that consumers will be harmed, the Department should not intervene in free markets.

In this proceeding, these principles counsel strongly in favor of United's position that the Department refrain from regulating the distribution of travel services over the Internet, a position strongly endorsed by American, Continental, Delta, Northwest and most of the other respondents whose economic interests are not advanced by regulating Internet-based distribution. The principles also support United's view that the time has come for the

Department to end its regulation of the CRS market, a position also supported by several other respondents.[1]

The results of airline deregulation over the past 20 years furnish strong evidence that the public interest would be best served by deregulation of airline distribution practices. As demonstrated below, the comments have furnished no compelling reason for the Department to extend its involvement in the airline distribution market. We recognize that this -- CRS deregulation in particular -- requires the Department to take a bold step forward that will likely meet with the disapproval of many commenters who are looking to the Department to award them (or at least preserve for them), through regulatory fiat, economic advantages that they could not obtain in an unregulated market. However, the record of the past 15 years of CRS regulation suggests it is clearly time to take that step.

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[1] See, e.g., Northwest Comments at 2, 7; Galileo Comments at 12.

II. Those Arguing in Favor of Regulating Internet Distribution Have Failed to Bear their Heavy Burden of Persuasion

A. Those Arguing in Favor of Regulation Bear a Heavy Burden of Persuasion. While differing substantially on whether and how online distribution of air transportation should be regulated, the comments filed agree almost unanimously on one thing: the Internet is a very significant development in the distribution of air transportation. There is a widespread recognition -- even among the CRS vendors -- that the Internet promises to foster unprecedented competition among providers of travel distribution services, substantially lowering distribution costs and encouraging innovation.[2]

The benefits to consumers from these developments will be enormous. Not only will they make air transportation more affordable, they will give consumers unprecedented information about and control over travel planning and

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[2] See, e.g., Galileo Comments at 12-13; Orbitz Comments at 28-35; Delta Comments at 18-21; Continental Comments at 9; American Comments at 4-8; Northwest Comments at 8-10.

purchasing. In short, they promise to further the process of "democratization" of air transport that was begun with airline deregulation twenty years ago. Indeed, this process is already underway -- as Internet distribution, unregulated, gains a foothold.

With these potential benefits hanging in the balance, the risks posed by *any* regulation of the Internet are enormous. If regulation has the same effects on Internet distribution that it has had on CRS systems over the past 15 years -- insulating them from competition, discouraging innovation and making interdependent pricing both possible and profitable -- the lost opportunity would be tragic.

In this context, the burden on those arguing in favor of subjecting Internet distribution to *any* body of regulations (either the CRS regulations or a comparable set of regulations) is high indeed. This is especially the case because, as pointed out in the submissions of various commenters, (i) the Department unquestionably retains the

authority to address unfair practices in online travel distribution on an *ad hoc* basis as required,[3] (ii) any set of regulations would likely be complex and burdensome to administer,[4] and (iii) it is directly contrary to the carefully considered policy pronouncements of this Administration (equally endorsed by Republicans)that

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[3] United agrees with the argument -- challenged by no commenter -- that the Department retains the authority effectively to address anticompetitive or deceptive practices in online distribution through its Section 41712 authority. Indeed, just last week, the Department affirmed that Section 41712 prohibits airlines from failing to disclose the availability of Internet-only fares to prospective passengers under certain circumstances, and set forth several safe-harbor disclosures airlines could make to avoid possible violations. Order 2000-10-23. (The Order clearly recognizes the benefits to the traveling public of avoiding any regulatory restrictions on carriers' use of the Internet to distribute tickets.) Just as it monitors bricks-and-mortar travel agent advertising to prevent consumer deception, the Department can and should take action against online sellers of air travel who act deceptively against consumer interests.

[4] Take, for example, the proposal advanced by Inspector General Kenneth Mead that DOT require airlines to make available the same fares they make available to Orbitz to all online distribution channels that offer the carriers the same cost savings. While perhaps theoretically appealing, the proposal invites DOT to involve itself in a complex morass, as it figures out whether the benefits to an airline deriving from one contract are the same as those deriving from another. The benefits United (and other suppliers) obtain from participating in any online distribution product extend well beyond any booking fee savings United may obtain and include access to the vendor's target market and economic and financial benefits that can accrue from joining in a strategic alliance with the vendor. These benefits can vary substantially from vendor to vendor, and some vendors may be offering products with which one or more carriers may not want to be associated. As such, decisions about which products a carrier wants to participate in should be left to the individual carrier's business discretion, not government dictate, subject only to the antitrust laws.

Internet commerce should not be subject to government regulation.[5]

B. Those Arguing in Favor of Internet Regulation Have Failed to Bear the Burden of Persuasion. Although phrased differently in the various comments submitted by supporters of Internet regulation, the arguments for why the Department should promulgate a body of regulations governing Internet travel distribution reduce to three: to protect smaller carriers; to protect consumers who might be misled if online sites were biased; and to ensure that all travel distribution channels -- CRS systems and online systems -- are subject to the same regulations. None is persuasive.

1. *Protecting small, low-fare air carriers.* The suggestion that, in order to protect small, low-fare carriers, the Department should restrict competition in the travel distribution market is belied by all available factual evidence. Left unregulated, Internet-based travel

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[5] See United Comments at 14-17.

distribution has proven to be a boon to small, low-fare carriers.[6] It has enabled them to market globally, on equal terms with larger carriers and at greatly reduced distribution costs, helping to support such carriers' low-fare pricing model.

In any event, the suggestion that the Department should specially regulate the market for travel distribution services to protect any specific group of carriers is contrary to the fundamental principles of U.S. airline deregulation. As noted in United's Comments, deregulation was founded on the belief that consumer welfare would be most enhanced by permitting *all* airlines -- big and small -- to compete on *all* fronts -- from pricing, to the routes and frequencies operated, to the terms and conditions upon which airlines obtain the

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[6] AirTran, for example, is now selling over 30% of its seats online, a percentage equivalent to Southwest Airlines, which continues its policy of not allowing its tickets to be sold through any CRS network. Aviation Daily, Sept. 12, 2000 (Southwest); AirTran Press Release, July 27, 2000. In Europe, EasyJet, one of the most successful, low-fare, new entrant carriers, also refuses to participate in any CRS network and is now selling over 75% of its tickets online. See, e.g., Aviation Daily, September 11, 2000.

"inputs" necessary to produce and distribute their services (including reservations and ticket distribution services).

To be sure, such competition is subject to the antitrust laws, which properly preclude carriers from, for example, monopolizing markets or engaging in deceptive or predatory behavior. Such laws should and do apply to online travel distribution, just as they apply to all other aviation-related activities. However, imposing "special" regulations, or codes of conduct, on top of the antitrust laws, to protect certain participants from the rigors of competition is antithetical to this system.[7]

The Department has imposed such a special layer of regulation just once -- in enacting the CRS regulations in 1984. As discussed in Section III(B) below, it did so because of what it believed was a unique confluence of circumstances then existing in the CRS market: (i) the four major CRS systems constituted, in its judgment, an

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[7] There is no more reason to specially regulate the market to provide carriers distribution services than there is to specially regulate the markets for labor, aircraft or inflight meals.

essential facility (a judgment in which United did not concur), and (ii) all four were owned by major carriers. *Absent* that unique set of conditions, it is doubtful that the regulations could have withstood legal challenge.[8]

Those conditions clearly do not exist in the market for distribution of air transportation over the Internet, even assuming they existed in the CRS market in 1984. There is no single web site or small group of web sites that function as an essential facility: hundreds of sites provide travel information and offer consumers the ability to purchase travel online and the barriers to entry are quite low (unlike the CRS market).

In any event, most of these sites (including the two largest, Travelocity and Expedia) are not owned by carriers. They have no inherent incentive to distort their displays in favor of a particular airline.[9] In fact, as

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[8] See United Air Lines v. CAB, 766 F.2d 1107, 1112 (7th Cir., 1985).

[9] To be sure, online sellers of air transportation might enter into contractual agreements with carriers to afford such carriers

persuasively argued in Expedia's comments, these sites have a strong economic interest in promoting vigorous airline competition.[10] In short, the unique market conditions relied upon to justify the unprecedented departure from deregulation with respect to CRS networks do not exist with respect to Internet distribution. In the absence of such conditions, there is no basis to add an additional layer of competition regulation on top of the already existing antitrust laws.

2. *Prevent consumer deception.* United fully supports the goal, expressed by many commenters, of ensuring that consumers are not deceived on web sites.

(footnote continued)

preferential displays. However, where such sellers are not owned by a single carrier, such arms length agreements would be open to any interested carrier. Furthermore, carriers remain free to terminate their participation with any online seller engaging in such practices. In any event, as discussed in Section II(B)(2) below, the Department has jurisdiction to ensure that any seller engaging in such practice does not in fact mislead the public about the neutrality of its displays. Finally, any consumer seeking a neutral site can reach one with a single mouse click.

[10] See Expedia Comments at 4. See also Galileo Comments at 16 (there is no evidence of display preferences in online Internet sites with multi-carrier booking functions).

However, as the Department itself has recognized,[11] a general desire to prevent consumer deception was not the basis for enacting most of the CRS regulations,[12] and does not furnish the basis to prescribe a comprehensive code of conduct for Internet sales. There exists ample authority for the Department and other authorities to prevent and prosecute deceptive practices by online travel sellers on an *ad hoc basis* without the need for such a code, with its many inadvertent, competition-stifling consequences.[13]

Just as carriers and travel agents are subject to enforcement action if they engage in deceptive advertising pursuant to the Department's and other agencies' broad authority to prosecute "deceptive practices," consumers can be protected from such practices by sellers of travel

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[11] See, e.g., Department of Transportation, Computer Reservations System: Final Rule and Denial of American Airlines Petition For Rulemaking, 57 Fed. Reg. 43780, 43794 (The Department's "basis for readopting the rules" was to prevent owner carriers from using their control over CRS systems to prejudice the competitive positions of competitors).

[12] As described in Section II(B)(1) above, those regulations were justified only by the unique confluence of considerations giving rise to a danger that airline CRS owners would preclude access by nonowners to an essential facility.

[13] See, e.g., 49 U.S.C. § 41712.

online. Indeed, addressing online deceptive practices on an *ad hoc* basis, rather than in a lengthy code, is preferable, as it maximizes the Department's flexibility to protect consumers in this rapidly evolving medium and causes online sellers constantly to reconsider whether their web sites are in practice deceptive.

However, if the Department feels compelled to address consumer protection on the Internet, United urges that it be limited to a statement of enforcement policy as the Department has done for carrier fare advertising, including, if necessary, safe harbor guidelines vendors could rely upon to disclose display practices, rather than a detailed series of proscriptive display bias rules. Compared to a lengthy and detailed code (such as the CRS regulations), such a statement of enforcement policy would presumably be easy to administer and have few inadvertent, competition-stifling consequences.

3. *Consistency between CRS and Internet regulation.* Some commenters (particularly, CRS vendors) have argued that the Department should extend its CRS

regulations to Internet distribution because, as SABRE states, "there is no difference between the travel distribution over a proprietary network (i.e., the traditional CRS model) and distribution over the Internet through web sites offering the services of many carriers."[14]

As a preliminary matter, United disagrees with the suggestion that the Internet web sites which would be subject to regulation are the functional equivalent of CRS systems. While distributing flight schedule and price information like CRS systems,[15] web-based travel distributors are in many ways closer to traditional travel agents: like traditional travel agents, their principal raison d'etre is to make travel bookings. As United has previously pointed out,[16] no one has advocated (and United would not support) regulation of retail travel agents' business practices. Consistency, however, would dictate

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[14] Sabre Comments at 17.

[15] United does not disagree that the distribution of travel-related information occurs through a variety of media, all of which do (and should) compete with each other, and selective regulation based on technological medium is unfair and unhelpful.

[16] United Comments at 7, n.3.

that, if bricks-and-mortar travel agents are to remain unregulated, web-based travel distributors should remain unregulated, as well.

In fact, SABRE's argument, taken to its logical conclusion, dictates in favor of regulating *all* distribution media, including carriers' proprietary web sites, 1-800 call centers, and ticket offices in any circumstance where those media are used to distribute the services of more than one carrier. Indeed, Expedia's comments, read literally, appear to endorse this conclusion, arguing that consumers should "enjoy regulatory protection" (i.e., the carrier should presumably be required to disclose the service offerings of all its competitors), even when they dial an airline-owned 800 number.[17] Leaving aside the enormous burden that such all-

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[17] Expedia Comments at 7-8. The definition of "system" proferred by Expedia, encompassing any "reservations system offered by a carrier ... that contains information about ... other carriers," further suggests that Expedia supports this conclusion. In today's world where virtually every airline code shares with one or more other airlines and most major airlines participate in alliances to extend the reach of their online networks, most airlines provide information about and sell other airlines' services through their reservations systems and web sites. Further, because most airlines participate in interline ticketing and baggage agreements with other carriers, they can and do

encompassing regulatory oversight would place on the Department's limited enforcement resources, the proposal harkens back to the worst excesses of regulation and is flatly incompatible with the core principles of aviation deregulation.

The logical solution to the problem of inconsistent regulation is not to regulate *either* Internet distribution systems *or* (as argued further below) CRS networks.

(footnote continued)

sell interline transportation through their proprietary reservations system. As such, the rule proposed by Expedia, applied literally, would subject all carriers' reservations media to content regulation as "Systems." Although United doubts Expedia intends such a result, the touchstone of its proposal, a carrier's offering of information about other carriers' services, contains no inherent self-limiting principle that avoids such an outcome. Thus, while United agrees in principle with Expedia that distribution outlets are largely fungible, and that government regulation should not impose disparate burdens or obligations on competing distribution alternatives, it strongly disagrees that carrier ownership or affiliation (whatever that means) alone are a reasonable organizing basis on which to ground the need for regulation.

On the other hand, to the extent substitutability as distribution outlets is posited as the touchstone for government regulation, as is urged by SABRE, there is no logical reason to impose content restrictions on CRS networks, and not to impose similar restrictions on all online vendors of travel services, regardless of ownership or affiliation (an outcome Expedia strenuously opposes). The logical resolution of this conundrum is, as noted in the text, to end prescriptive content regulation of, and forced participation in, all fungible distribution media and rely instead upon the vigorous enforcement of the antitrust and consumer protection laws to protect consumers and competition, as is done in virtually every other industry.

Ushering CRS networks into the brave new world of deregulation would only accelerate competition among all travel distribution service providers to the benefit of consumers.

C. Specific Internet Distribution-Related Issues. Many commenters have proposed extension of some, but not all, of the CRS regulations to Internet distribution. Specific proposals have included (i) extension of the "mandatory participation rule," whereby a carrier with an ownership or contractual relationship with one Internet distribution site would be required to participate in all such sites, and (ii) the requirement that Internet fares made available through one site be made available through all other sites and/or other travel distribution media. United vigorously opposes both of these proposals.

Both rules would have the same pernicious, competition-stifling effects that their counterparts have had in the CRS context (recounted by United at length in

previous pleadings[18]). In short, both would eliminate the incentive for distribution systems to compete with lower costs and better service for carrier business. Both would also limit the availability of discounted fares, as carriers -- forced to make such fares available regardless of the channel's costs -- would simply cease to make them available at all.[19]

III. Extension of CRS Regulations

A. Radical Change of the CRS Rules is Required. The comments reflect widespread dissatisfaction with the CRS rules. Whatever their role in addressing display issues a decade and a half ago, the rules are today criticized for not only failing to address, but in fact precipitating, serious problems in CRS services, including the enormous increase in booking fees and the failure to keep pace with

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[18] See, e.g., Comments of United Air Lines, Inc. (dated December 12, 1997), Reply Comments of United Air Lines, Inc. (dated February 6, 1998).

[19] Indeed, the Department has already concluded that the pro-competitive policies of the Transportation Code "allow airlines to choose the channels for distributing their services as well as the prices and terms of sale for different channels," subject only to the strictures of the antitrust laws. Order 2000-10-23 at 4-5. In the same Order, the Department concluded that carriers offering of Internet-only fares was not an unfair or deceptive practice.

technological innovation.[20] The rules are also criticized for failing to prevent subtle forms of bias,[21] failing to address disparities in power between carriers and travel agents,[22] failing to address the relationships between CRS systems and marketing carriers,[23] and being inconsistent with the CRS regulations promulgated by other countries.[24] While United does not agree with all of these criticisms, the breadth of the criticism counsels strongly against simply extending or tweaking the existing regulations. The existing regulations no longer work; fundamental change is required.

As explained in its comments, United believes that that change should be the sunset of the CRS rules. Any change short of wholesale deregulation of CRS services will distort the market for provision of travel distribution services between the unregulated players (e.g., online

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20 See Orbitz Comments at 15-17 and 29-33.

21 Orbitz Comments at 12.

22 See Amadeus Comments at 31; Galileo Comments at 11-12.

23 See, e.g., Amadeus Comments at 28.

24 See, e.g., British Airways Comments at 3-4.

sellers) and the regulated (CRS vendors), reduce competition, and leave CRS vendors at a unique disadvantage. CRS vendors realize as much: while their preferred solution is generally to subject all travel distribution services to the same stultifying (albeit, for them, enriching) regulations, vendors also urge that, if the Department chooses not to regulate online distributors, they too should also be freed of regulation and permitted to compete on equal terms.[25]

B. The CRS Regulations Can No Longer Be Justified Under the Antitrust Analysis that Was Critical to their Enactment in 1984. While commenters have offered various bases for extending the CRS rules (subject, invariably, to modifications), no one has demonstrated that the rules remain justified under the economic analysis performed by the Department in 1984. As the Seventh Circuit Court of

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[25] See e.g., Sabre Comments at 17-18.

Appeals found in United Air Lines v. CAB, that analysis is critical to the rules' validity.[26]

In fact, the rules do not remain valid under that analysis. That analysis -- reflected in both the Notice of Proposed Rulemaking issued in March 1984 and the Final Rule issued in September 1984 -- indicated that the rules were grounded on two critical premises: (1) CRS systems are an essential facility for the sale of air transportation and CRS owners have market power; and (2) CRS owners are competitors in the downstream market. Both of these premises are today subject to challenge.

1. *It is unclear that CRS systems remain essential facilities.* In 1984, the Department concluded that "access to a high percentage of travel agents is essential" for carriers and that "CRS's are by far the primary conduit to information from carriers to the travel

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[26] United Air Lines v. CAB, 766 F.2d 1107, 1113 (2d Cir. 1985) (the validity of the portion of the CRS regulations that constitute "antitrust rules" (i.e., all but the display bias rules) "rest[s] entirely on the Board's antitrust analysis").

agent community."[27] Accordingly, it found that the CRSs constituted "essential facilities" for carriers. It cited several federal appellate decisions on "essential facilities" -- including Official Airline Guide v. FTC, 630 F.2d 920 (2d Cir. 1980) and Fulton v. Hecht, 580 F.2d 1243 (5th Cir. 1978) -- as "alternate bases" (in addition to its statutory power under Section 41712) for the CRS regulations.[28]

The Department fully accepted that *if* there was a viable alternative means for carriers to communicate with agents, or if entry into the CRS market were easy, CRS owners would not have market power and there would be no need for CRS regulation. It stated:

> Reaching 90% of the travel agent market efficiently requires access to CRS systems. In economic terms, the cross-elasticities of demand between CRS's and their alternatives are very low for almost all carriers and travel agents. That, in and of itself would not be a great concern were entry into the CRS industry easy or were the market not concentrated and agents and carriers could use multiple systems or quickly switch between systems.

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[27] 49 Fed. Reg. at 11653-11654.

[28] 49 Fed. Reg. 32540, 32546-32547.

However, it concluded, in 1984, "none of these is the case."

As evidenced by the comments of CRS vendors and online distributors of travel information and booking services,[29] the world has radically changed. It is far from clear that each CRS system still constitutes an essential facility. As a preliminary matter, software has recently been developed (e.g., by a company called Nexion) affording subscribers to any one CRS system access to the databases of all four CRS systems. Such access means that participation in all four CRS systems is no longer required. Moreover, since 1984, alternative distribution channels, including online distribution, have developed that can and do function as competitive alternatives to CRS distribution. The percentage of carrier sales occurring through alternative media have increased dramatically.[30] Some airlines no

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[29] See, e.g., Galileo Comments at 12-13; Orbitz Comments at 28-33.

[30] See WebTravel News.com, October 2, 2000 (percentage of total passenger revenues booked online will increase from 2% in 1998 to 9% in 2000); id. (revenue from sales of airline tickets sold over the

longer participate in all the CRS systems[31] and some allow no CRS system to book their services at all (e.g., Southwest, Easyjet). Perhaps most importantly, even if the majority of tickets continue to be sold through CRS systems, the existence of a competitive alternative to CRS-based distribution constrains the market power of CRS vendors.

In 1984, the Department anticipated the possibility of such technological development and made quite clear what the Department should do if it occurred. It stated unequivocally: "[S]hould the CRS owners' market power dissipate through new developments, the rules should be eliminated or modified."[32]

(footnote continued)

Internet will almost double from 1999 ($4.7 billion) to 2000 ($8.7 billion); Aviation Daily, March 3, 2000 (other distribution media, such as wireless application protocols (WAP) and interactive television, are "advancing rapidly" in Europe).

[31] Ryanair, for example, recently withdrew from Galileo. Aviation Daily (May 30, 2000).

[32] 49 Fed. Reg. at 11657.

2. *CRS owners are no longer competitors in the downstream market.* The Department's decision to adopt CRS regulations in 1984 was also based on the critical fact that CRS owners were airlines competing downstream. As the Department explained: "because [CRS owners] are competitors in the downstream air transportation industry, they have the ability and incentive to exercise that power in ways that may interfere with air transport competition."[33]

As the Department itself has recognized, the terms "airlines" and "CRS owners" are no longer interchangeable, as they were in 1984. CRS systems have undergone radical changes; they are no longer wholly owned and controlled by carriers. In the absence of such control, the foundation of the Department's rationale for regulating has been stripped away. As the Department itself noted in enacting the CRS rules in 1984:

> [T]he essential facility doctrine may not be applied where the facility is owned by a person or persons that do not compete with others wishing to gain

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[33] 49 Fed. Reg. at 32542 (emphasis added).

> access. If the monopolist does not compete in the enterprise of those seeking access, it has no inherent incentives to prefer one potential purchaser to another and is therefore apt to attempt to accommodate as many as possible.[34]

In sum, the CRS rules have not been, and can no longer be, justified under the economic analysis that the Seventh Circuit held to be critical to the rules' validity in 1984.

C. The United States' International Commitments Do Not Require Continuation of the CRS Regulations. Several commenters argue that the United States' commitments in various bilateral air services agreements to protect foreign airlines from discriminatory treatment in the distribution of air transportation justify the perpetuation of CRS regulations.[35] In fact, no bilateral agreement of which we are aware obligates the United States to promulgate a set of CRS regulations to honor its bilateral

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[34] 49 Fed. Reg. at 32546.

[35] Amadeus, for example, argues that "the U.S. is . . . obligated to protect foreign airlines, including owners of CRSs, from discriminatory treatment by U.S. carriers in the realm of the distribution of airline services. . . . [T]he CRS rules serve precisely this function." Amadeus Comments at 13.

undertakings.[36] To be sure, many of the United States' bilateral agreements -- including all of its Open Skies agreements -- contain "principles of non-discrimination" exhorting the parties to ensure *inter alia* that CRS vendors operating in their territory allow all airlines willing to pay any applicable non-discriminatory fee to participate in its CRS, and that all distribution facilities shall be offered on a non-discriminatory basis.[37] There is no requirement, however, that these protections be afforded through a set of standing rules (along the lines of the CRS rules).[38] Rather, either party is free to achieve

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[36] Amadeus also argues that recent amendments to §41310 of the Transportation Code buttress the case for maintaining the CRS regulations as an international obligation of the United States. Amadeus Comments at 15-16. United disagrees. The amendment referred to, the adoption of new §41310(g), does nothing more than expand the category of persons eligible to file complaints against discriminatory practices of certain foreign firms to include a "computer reservations system firm" and to clarify the Secretary's jurisdiction over CRS practices that affect airline service. Nothing in the amendment even suggests, let alone requires, that the Secretary maintain the CRS rules.

[37] U.S. Model Open Skies Agreement, Annex III.

[38] U.S. bilaterals also include provisions limiting the user charges that can be imposed on designated airlines to those that are just and reasonable. The Department has never felt the need to implement these obligations through prescriptive rules, and its Policy Statement on Airport Rates and Charges has, as its core principle, the concept that airport rates and charges should be set by agreement, a principle reflected in the User Charge provision of the U.S. model Open Skies Agreement. Article 10. Nonetheless, under Article 10, the Department bears ultimate responsibility to ensure that foreign carriers are

compliance with these principles in whatever manner it chooses, including, in the case of the Department, using statutory enforcement powers on an *ad hoc* basis to preclude deceptive or discriminatory activities, as discussed in Section II(B)(2) above, in appropriate cases.[39]

On a related point, a number of commenters believe the existence of CRS regulations in other countries dictate that the United States *should* (even if it does not have to)

(footnote continued)

protected from unjust and unreasonable charges, a responsibility the Department implements only through ad hoc enforcement proceedings when disputes cannot be settled through negotiation. There is no reason in law or policy why the Department must follow a different course to respond to the undertakings included in the CRS Annex.

[39] In any event, the suggestion, advanced by at least one commenter (Amadeus), that the Department's authority to promulgate and apply CRS regulations can *derive* from an executive agreement with a foreign government is legally unsupported. The mere existence of an executive agreement requiring the United States to police CRS practices does not somehow automatically expand the Department's jurisdiction to regulate all CRS systems. Rather, the Department's jurisdiction remains limited by statute to those CRS systems that qualify as "airlines" or "ticket agents." See 49 U.S.C. § 41712. See also SANPRM, 65 Fed. Reg. at 45556 (querying whether DOT retains jurisdiction to regulate CRS systems that are no longer affiliates of airlines). To be sure, the United States remains bound by its commitment under international law. But the commitment does not somehow replace the normal constitutional processes whereby the powers of federal agencies derive solely from Congressional authorization. See United States v. Guy W. Capps, 204 F.2d 655 (4th Cir. 1953) (executive agreement is void if not authorized by Congress and contravenes provisions of a statute dealing with the very matter to which the statute relates).

retain its CRS regulations as part of a broader effort to harmonize U.S. and foreign government policies towards CRS regulation. While United does not oppose in principle the idea of harmonization, harmonization does not presuppose the maintenance of the CRS regulations. In any event, to the extent harmonization should occur, the better outcome would be for the EU and Canada to pare back (if not terminate altogether) *their* CRS regulations, which are, if anything, even more market-distorting than the Department's current rules.

C. The Department Does Not Have Authority Under Section 41712 to Regulate Vendors Who Are Not Owned or Controlled by Carriers. A number of commenters have argued that the Department continues to have authority under 49 U.S.C. § 41712 (formerly Section 411) to regulate the activities of CRS vendors, even where such vendors are no longer owned or controlled by carriers. Amadeus, for example, argues that "nothing in that statute restricts the Department's jurisdiction to . . . entities that are

entirely airline-owned or controlled."[40] Amadeus misses the point. The Department has only that jurisdiction conferred upon it by Congress. And it clearly does not have jurisdiction over all CRS systems.[41]

Section 41712 -- the only statutory basis cited for the CRS regulations -- authorizes the Department to

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[40] Amadeus Comments at 7.

[41] As noted supra at 20-21, the core principle on which the Department's jurisdiction to adopt the CRS rules was grounded was that the airlines owning the systems competed in the downstream transportation market with airlines that were dependent on the systems to distribute their services. The CRS rules were intended to ensure these non-owning airlines access to the downstream air transportation market, not the CRS industry market. As noted in the text, the CRS business itself is an information technology business, not the business of providing air transportation. The Department has no responsibility for, or jurisdiction over, the CRS business. Thus, to the extent Worldspan and others urge the Department to regulate CRS vendors to protect competition in the CRS industry, such exhortation is misplaced. Worldspan Comment at 2.

The Department has no responsibility for, or jurisdiction to promote, competition in the CRS industry. Even though three of the four principal vendors in the United States continue to have air carriers as shareholders or, in the case of Worldspan, limited partners, the vendors themselves are no more air carriers or ticket agents than was the Official Airline Guide in 1980 when the FTC brought suit against it for its refusal to include commuter carriers' flights in its service listings. If the Guide had been subject to regulation under Section 411 as an air carrier or ticket agreement, the FTC would have had no jurisdiction to bring its suit. The conclusion must be, therefore, that the mere distribution of information about airline service or the offering of a communication facility to permit online bookings does not in itself give the Department jurisdiction over the vendors of such services.

"investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."[42] Where unfair or deceptive practices or unfair competitive practices are found to exist, the Department may, after notice and an opportunity for a hearing, "order the air carrier, foreign air carrier or ticket agent to stop the practice."[43]

CRS systems are patently not "air carrier[s], foreign air carrier[s] or ticket agent[s]."[44] In the past, the

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[42] 49 U.S.C. §41712 (emphasis added).

[43] Id.

[44] It is beyond dispute that a CRS system *per se* is not an "air carrier" or "foreign air carrier," as it does not seek to "provide air transportation." 49 U.S.C. §§ 40102(a)(2) and (a)(21). It is also clearly not a "ticket agent." See id. § 40102(a)(40) ("`ticket agent' means a person . . . that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing or arranging for, air transportation.") Rather, CRS systems are the conduit *between* carriers and ticket agents; they are providers of information services. Indeed, Amadeus recognizes as much: "While CRSs are not ticket agents, they are the essential tool . . . on which such agents rely." Amadeus Comments at 11. Whatever the accuracy of this statement, it does nothing to support the claim that the Department has statutory authority to regulate all CRS systems.

Department has managed to regulate CRS systems (and the Court of Appeals has upheld such regulations) only as affiliates of air carriers. While this may have been defensible when CRS systems were in fact wholly owned by air carriers, it is not defensible with respect to CRS systems in which carriers no longer have any ownership interest (*e.g.*, SABRE) or only a minor, non-controlling interest (*e.g.*, Galileo).

The theory underlying CRS regulations as a whole also counsels against extending them to CRS systems that are not owned or controlled by carriers. As described above, the sole basis for adopting CRS regulations was the fear that carriers would have the inherent incentive to use their control over the CRSs (essential facilities) to disadvantage their competitors. A CRS system that is not owned or controlled by carriers has no such inherent incentive. Indeed, the Department recognized as much when re-adopting the rules in 1992:

> We will again limit the rules' coverage to airline-affiliated CRSs used by travel agencies. This decision flows largely from our basis for readopting the rules. CRSs present potential competitive and deception problems because the systems are owned or affiliated with carriers who have the incentive (and

> the ability) to use their control to prejudice the competitive position of other airlines. . . . [I]f a non-airline firm did not operate a CRS, it would not have an incentive to use the system to capture additional airline bookings.[45]

Those commenters, like Amadeus, who argue that DOT should regulate CRS systems that have "any commercial ties to an airline" seek to stretch DOT's statutory authorization beyond the breaking point. We are aware of (and they cite) no authority for the proposition that the authority to regulate "air carriers" includes the authority to regulate entities that have entered into arms length commercial relationships with air carriers. By Amadeus' logic, the Department would have authority to regulate the business affairs of any entity contracting with an airline -- clearly an extension of the Department's authority that Congress in no way intended.

D. Specific CRS Regulation-Related Issues. Again, many commenters have advanced specific proposed changes to

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[45] See 57 Fed. Reg. 43780, 43794 (Sept. 2, 1992). It is clear that the last sentence, although rather awkwardly phrased, means to suggest that a non-airline owned system would have no inherent incentive to take actions that would raise competitive concerns.

the CRS regulations. United's position remains that these regulations should be repealed in their entirety. In the event the Department nonetheless opts to keep some of the regulations, United urges the following:

- CRS systems should continue to be free to sell booking data.[46]

- The Department should preclude CRS vendors from "tying" participation in their online distribution

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[46] United agrees with Delta that continued access to CRS booking data facilitates carriers' ability to schedule service in response to consumer demand and helps to promote a more competitive industry, benefiting consumers. Delta Supplemental Comments at 34-37. As Delta also notes, the Department applies similar disclosure principles to the various data it collects from industry participants. Id. at 34-35. More fundamentally, economic theory teaches that the wide and rapid dissemination of price and related information is one of the prerequisites for a competitive market, and where most of the other prerequisites exist, as they do in the domestic air transport industry, widespread dissemination of relevant information can be expected to make a market work more competitively. The handful of comments urging DOT to restrict access to CRS booking data essentially ignore these pro-competitive benefits and fail utterly to provide a persuasive case that the government should restrict the free flow of this information. These comments also misstate the information available. For example, contrary to the claim made in several of the comments, the CRS data vendors sell do not identify the passenger making a booking or the price charged. In short, the data help to promote industry competition and have become an integral part of carriers' planning and sales promotion efforts. The proponents of restricting release of the data have simply failed to show that such a draconian measure would be consistent with the public interest.

channels to participation in their proprietary CRS systems.

- As discussed in previous pleadings and above, the mandatory participation rule (Section 255.7) and requirement that systems charge all carriers the same fees (Section 255.6a) are the most pernicious of the CRS regulations.[47] These rules reinforce whatever market power CRS vendors possess, insulate the vendors from market forces that would otherwise require them to compete over the terms they offer for system

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[47] There are other objections to the mandatory participation requirement, which may effect an uncompensated taking in violation of the standards set forth in Ruckelshaus v. Monsanto Corp., 467 U.S. 986 (1984) (explaining that governmental disclosure of proprietary information can effect a taking and give rise to a claim for compensation), and may also violate various parties' First Amendment rights, including the rights not to be compelled to facilitate a competitor's speech, see Pacific Gas & Electric Co. v. Public Util. Commission, 475 U.S. 1, 14 (1986) (holding that a utility could not be required to distribute an opponent's fundraising appeal because it had "the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents"), and (2) not to be compelled to speak in a particular manner, see Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp., 515 U.S. 557, 575 (1995) (holding that a parade could not be required to "propound a particular point of view"); Glickman v. Wileman Bros. & Elliott Inc., 521 U.S. 457 (1997) (holding that, in the circumstances, fruit producers could be required to pay for generic product advertising under a Department of Agriculture marketing order, but recognizing that the program at issue did not "require respondents to repeat an objectionable message out of their own mouths").

participation, including booking fees, and effectively leave carriers deemed to be "system owners" (and, for that matter, non-owners as well)[48] powerless to negotiate with vendors the terms for system participation. As United has pointed out in other pleadings in this docket, if the mandatory participation rule is not repealed, the definition of the term "system owner" should be modified to apply only to carriers that control a vendor, whether through ownership or contractual undertakings and the obligations on system owners should certainly not be expanded.

Various commenters have argued that the Department should adopt a broader definition of "system owner"[49] and/or impose more burdensome requirements on system

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[48] Non-owners are affected just as much as system owners because of the uniform fee rule and participation requirements.

[49] See, e.g., Amadeus' Comments at 28-30. Despite the now widely recognized anti-competitive effects of the mandatory participation and uniform booking fee rules, Amadeus urges the Department to extend the definition of the term "system owner" to include system marketer. Id. See also Galileo Comments at 9-10; Worldspan Comments at 11 (opposing an outcome where carrier-owned systems would be regulated, but independent systems and on-line distributors would not).

owners.[50] Expedia, for example, supports expanding the definition of the term "system owner" to include not only a carrier holding five percent or more of a system's equity, as at present, but also a carrier "that together with affiliates, other carriers, and affiliates of other carriers holds more than twenty percent or more" of a system's equity.[51] Under this definition, it appears that a carrier owning as little as .01% of the equity in any system, as defined, would have to participate in all other systems so long as carriers in the aggregate own 20% of the system's equity. Leaving aside the plainly erroneous justification offered by Expedia for its 20%

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[50] See, e.g., SABRE's Comments at 24-25. Not surprisingly, SABRE, whose two principal marketers are American and Southwest (neither of which is now a "system owner" as presently defined), avoids any discussion of whether system marketers should be subject to the same system participation obligations as owners. It does argue, however, that if the Department wants to avoid consumer deception on the Internet, it should extend the mandatory participation obligations for "owner carriers" to "include both the provision of all necessary competitive functionality ... and all fare information made available to their own systems, including off-tariff, non-published fares...." Id. SABRE would also extend the definition of system to include multi-carrier websites. Id.

[51] Expedia Comment at 9. Expedia would also redefine the term "system, as noted supra at n. 17.

threshold,[52] the regulation of the distribution practices of carriers with non-controlling minority interests in systems cannot be justified under the

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[52] Expedia explains the 20% threshold as being based on the Antitrust Guidelines for Collaborations Among Competitors (April 2000) ("Guidelines") recently published jointly by the Federal Trade Commission and Department of Justice. Expedia's reliance on the Guidelines is entirely misplaced. As used in the Guidelines, the 20% figure represents not shares in the collaboration itself but the collective market share of the collaboration and its participants in each relevant market in which competition may be affected. The 20% figure represents a safe harbor; under the Guidelines, where the participants and the collaboration collectively have a share of no more than 20% of a relevant market, the Agencies, absent extraordinary circumstances, would not challenge the collaboration. Guidelines at §4.2.

Apart from the fact that the issue here is not whether any particular joint venture is consistent with the antitrust laws -- the issue to which the Guidelines are addressed -- there is no logical nexus between the collective share of a relevant market collaborators in a joint venture can hold for the venture to be presumed pro-competitive, and the collective share of a "system" carriers can own before they should be subject to a mandatory participation requirement. In any event, the Guidelines emphasize both that the 20% safety zone is not intended to discourage competitor collaborations that fall outside the zone, and that many collaborations falling outside the zone are procompetitive or competitively neutral. Guidelines at §4.1.

Even though the Guidelines are wholly irrelevant to the issue of mandatory system participation, they do bear on the arguments advanced in this proceeding looking to impose regulation on the prospective business practices of Orbitz solely due to the fact that airlines (including United) are today the primary investors in Orbitz. Orbitz is being developed to compete with other firms in the market for the distribution of airline tickets. As travel agents presently account for 70% or more of all airline ticket sales and less than 10% of tickets are sold online, it is clear that Orbitz and the carriers that have joined together to form Orbitz will have well less than a 20% share of the ticket agent market. Orbitz is, therefore, presumptively lawful under the Guidelines. In any event, the Department of Justice is reviewing Orbitz's business plan and the Department should leave to it resolution of the claims concerning Orbitz's consistency with the antitrust laws.

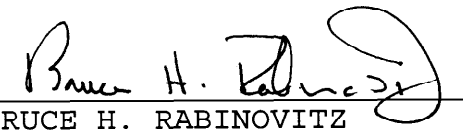
Department's longstanding rationale for CRS regulations, as set forth in Section III(C) above.

Conclusion

As United noted in its Comments, the issues currently before the Department in this proceeding -- in particular the issue of whether to extend CRS-type regulation to the Internet -- are of critical importance to consumers of air travel. On the one hand, the Department can extend the CRS rules that are costly anachonisms in today's industry, or, worse still, establish itself as the first government agency to subject an online industry to special regulation. Alternatively, it can secure for consumers the widely-recognized benefits of deregulation in the one area of airline activity -- distribution -- that has remained subject to pervasive and stifling (if well-meaning)

government regulation for the past fifteen years. United submits that, as demonstrated above, the correct choice is clear.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Comments of United Air Lines, Inc. on all persons listed on the attached Service List by causing a copy to be sent via first-class mail, postage prepaid.

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